Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

(39)

No. 02-626

In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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REPLY BRIEF

Our opening brief demonstrated that the plain language, structure, and history of the Clean Water Act, confirmed by basic principles of statutory interpretation, establish that the District does not have to obtain an NPDES permit to operate its S-9 pump. Like hundreds of thousands of other publicly owned water diversion facilities around the country serving critical flood control and water allocation needs, the S-9 pump *moves* navigable waters along with pre-existing pollution, but it does not *add* new pollutants to those waters. Because the S-9 pump is not the source or origin of an "addition" of any pollutant to the navigable waters—an especially absurd idea here, where manmade sub-basins across which the pump transports waters have not changed the unitary nature of South Florida's water system (J.A. 68) —the pump does not result in a "discharge of pollutants" requiring an NPDES permit.

The United States agrees that this is the correct reading and application of the statutory language, as EPA has consistently done since passage of the CWA by permitting practice, in regulations, and in litigation. EPA has not in the past 30 years required NPDES permits for facilities that transport or convey navigable waters, including the S-9 pump that the Army Corps constructed and now oversees. EPA regulations expressly distinguish between a point source that introduces pollutants to navigable waters (which requires an NPDES permit) and one that conveys polluted navigable waters (which does not). See 40 C.F.R. § 122.26(b)(9) (excluding from the definition of a municipal storm water "outfall" to navigable waters "conveyances which connect * * * waters of the United States and are used to convey waters of the United States"). And EPA's litigating position is "in no sense a '*post hoc* rationalization'" but a long held and frequently reiterated view "reflect[ing] the agency's fair and considered judgment." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); *e.g.*, *Gorsuch*, 693 F.2d at 165, 167 (EPA's interpretation "was made contemporaneously with the

passage of the Act, and has been consistently adhered to since").

Respondents would vastly expand the Section 402 federal permitting requirement to reach, for the first time, huge numbers of facilities that divert water for beneficial purposes and that have been regulated for decades through State water quality programs. Their arguments for this shift of authority away from the States are meritless. None provides any reason to depart from Congress's clear intent that diversions of navigable waters like S-9 not be subjected to federal NPDES permitting.

1. By its plain language Section 402 does not apply to water diversions. Respondents attribute to the District an argument it does not make. We do not contend that, to fall under Section 402, a point source must itself generate the pollutants that it adds to navigable waters. That is not the meaning of the statutory language and would gut the NPDES, since point sources typically convey rather than create pollutants.

What the definition of a "discharge of pollutants" subject to Section 402 does require, however, is that there be an "addition" of a pollutant "from" a point source "to navigable waters." CWA § 502(12). As we have explained (Br. 26-27) and the United States agrees (U.S. Br. 15-20), that language plainly indicates that for Section 402 to apply a point source must be the origin or source of the initial entry of the pollutant into navigable waters. Congress's goal was to control pollutants "at the source" (*Riverside Bayview*, 474 U.S. at 133), not to require federal permitting of every diversion through which polluted water passes. See CWA § 304(f)(2)(F). As we and the United States agree (Pet. Br. 27; U.S. Br. 16-17), and as the courts of appeals affirmed in *Gorsuch* and *Consumers Power*, an "addition" of pollutants to navigable waters from a point source "occurs only if the point source itself physically introduces a pollutant into water *from the outside world*"—not when "polluted water * * * passes through the [point source] from one body of navigable

water * * * to another." *Gorsuch*, 693 F.2d at 175 (emphasis added); *Consumers Power*, 862 F.2d at 586 ("To the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention" not to require NPDES permitting).

2. Though the S-9 is a "point source," it adds nothing to navigable waters. Respondents offer no plausible alternative explanation of the statutory language. They make much of the fact that the S-9 fits the description of a "point source." Tribe Br. 19-21. But that is just the beginning of inquiry. A point source needs an NPDES permit only if it adds pollutants to navigable waters, which the S-9 does not. There is therefore nothing odd about pipes, pumps, sluice gates, or similar diversions that fit the physical description of point sources being subject only to nonpoint regulation. See *Consumers Power*, 862 F.2d at 583-584, 588 (it is "circular" to contend that "'point source' may not be defined independently of 'addition'"; "water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category"); 40 C.F.R. § 122.26(b)(9) (point sources connecting navigable waters not subject to NPDES).

We do *not* rely on a statutory "exemption" from NPDES regulation. Tribe Br. 21-22, 27-30. Because the S-9 is not the source of an addition of pollutants, it does not fall within the scope of Section 402 to begin with. Section 304(f)(2)(F) is not an "exemption" but a pellucid confirmation of Congress's understanding that "pollution resulting from" flow diversions belong in the nonpoint source category of regulation because they involve no "discharge of pollutants." That intent is underlined by the plainest of legislative history. See H.R. Rep. No. 92-911, 1972 LEG. HIST. at 796 ("Section 304[f] addresses the problem of nonpoint sources of pollutants [such as] manmade changes in the normal flow of surface and ground waters"). Virtually all methods of changing the "movement, flow, or circulation" of waters involve the use of "discernable, confined, discrete conveyances." But Congress

understood that those point sources do not "add" pollutants to navigable waters "from" the facility. Section 304(f)(2)(F) would be meaningless if, as respondents contend, flow diversion through a point source remained subject to NPDES. Tribe Br. 27-28; Browner Br. 11-12.

3. Opposing amici's reference to groundwater movement is a red herring. It is also important to understand, and for this Court to make clear, that no Section 402 discharge occurred even if the S-9 pumps, in conveying the navigable waters of the C-11 canal into the WCA-3, moved some ground water with it. See Florida Wildlife Fed'n Br. 16-18. Congress in Section 304(f)(2)(F) manifested its understanding that changing the flow or circulation of "navigable waters *or ground waters*" in a way that results in "pollution" does not involve discharges regulated under Section 402 but is subject to nonpoint source regulation. That any induction of ground waters by the S-9 pump would not introduce pollutants from "the outside world" into navigable waters is particularly obvious. In the Everglades region, as the Tribe's expert conceded, there is no meaningful distinction between ground and surface waters. J.A. 117, 119 ("We have a problem when we talk about ground water in the Everglades. Ground and surface waters are essentially the same thing. * * * [I]t's an unconfined aquifer"; "water flows surficially and through the ground water. We have a * * * porous type of situation"); see, *e.g.*, David McCally, THE EVERGLADES: AN ENVIRONMENTAL HISTORY 9 (1999) (this is a "hydrologic system where surface water and groundwater [are] one"). Accordingly, diversions of surface water in South Florida often also move groundwater. Indeed, most significant water diversions, wherever located, result in changes in the relationship between surface and ground water.[1]

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[1] There is no question that the S-9 pump is a "flow diversion facility." *Cf.* Tribe Br. 28-29. It changes the "movement" and "flow" of the waters of the C-11 canal, as the canal is now engineered, by diverting the C-11's waters across the levee into the WCA-3. It thereby replicates the natural flow of water before the C&SF Project, keeping the Everglades supplied with water critical for their survival. See McCally, *supra*, at 8 (noting the "generally westerly direction of drainage" in the Everglades); J.A. 66 (Tribe's expert testified that maintaining water levels in the WCA-3 is necessary for "the long run * * * restoration of the remaining Everglades"). This Court recognizes that water "diversions" take many different forms. *Escondido Mut. Water Co.* v. *La Jolla Indians*, 466 U.S. 765, 768 (1984), aff'g in part 692 F.2d 1223, 1226 (9th Cir. 1982); *Arizona* v. *California*, 373 U.S. 546, 553-564 (1963).

4. The District's position is fully consistent with other elements of the statutory and regulatory scheme. Respondents and their amici assert that there are inconsistencies between recognizing that water diversion facilities like the S-9 do not require NPDES permits because they do not "discharge" pollutants to navigable waters and other federal permit requirements under the CWA. The circumstances they point to in which permits are required are readily distinguishable. All involve the obvious introduction of pollutants from point sources to navigable waters and hence involve "discharges," not mere water diversions.

Municipal separate stormwater system permits. The C-11 canal does not require an NPDES permit under CWA Section 402(p) as a municipal separate stormwater system ("MS4") discharging to navigable waters. See Tribe Br. 22-24 & n.12; Florida Wildlife Fed'n Br. 19-21. Even if the C-11 were part of an MS4 (which respondents did not assert below and which we do not address), applicable EPA regulations recognize that "municipal separate storm sewer discharges to waters of the United States" do *not* include "pipes, tunnels or other conveyances" like the S-9 "which connect * * * waters of the United States and are used to convey waters of the United States." 40 C.F.R. § 122.26(b)(9).

Publicly owned treatment works. Publicly owned treatment works ("POTWs") treat domestic and industrial waste-

water, including sanitary sewage, often discharging treated water into navigable waters while otherwise disposing of remaining sewage sludge. See 33 U.S.C. § 1311(b)(1)(B); 40 C.F.R. § 122.21(j). POTWs *always* do "more than" pass polluted nonpoint source runoff to navigable waters (*Cf.* Tribe Br. 22; Browner Br. 7); sewers collecting only runoff are covered by the MS4 rules discussed above. POTWs by definition collect sanitary and other wastewater from domestic and industrial sewage pipes and then treat it, utterly transforming it before disposal. See THE CLEAN WATER ACT HANDBOOK 69-81 (M. Ryan ed. 2003). It is not remotely relevant to the issues in this case that POTWs require NPDES permits when they collect, treat, and then discharge treated sanitary sewage to navigable waters.

Irrigation return flows. Respondents and their amici rely on a 1975 EPA General Counsel opinion that irrigation return flows from agriculture may result in a discharge even if they are treated as navigable waters. Tribe Br. 31; Browner Br. 17-19. But Congress disapproved that analysis in 1977, specifically providing that irrigation return flows from agriculture involve no discharge requiring federal permits. CWA § 502(14). In any event, when water is used to irrigate crops it loses its character as "navigable waters" (see U.S. Br. 23) and may pick up new pollutants from fertilizers, pesticides, and other sources. Its subsequent release into navigable waters through a point source would logically qualify as an "addition" of pollutants absent Section 502(14). That is in no way inconsistent with recognizing that diverting navigable waters containing pollution involves no discharge.

State Water Quality Standards and Total Maximum Daily Loads for water bodies and segments. Recognizing that Section 402 permits are required only when pollutants are first added to navigable waters from a point source is consistent with requirements elsewhere in the CWA and its implementing regulations that apply to distinct water bodies or segments of navigable waters. *Cf.* N.Y. State Br. 10-14. States establish water quality standards ("WQS") for "a

specific portion of the navigable waters." 33 U.S.C. § 1312(a) (providing for water quality based effluent limitations on point source discharges when necessary to attain "water quality in a specific portion of the navigable waters"); see also, *e.g.*, *id.* § 1313(d)(1)(B) (requiring States to identify "waters or parts thereof" for which certain controls are insufficiently protective). As EPA regulations explain, "[w]ater quality standards * * * are the State's goals for individual water bodies." 40 C.F.R. § 130.0(b); see also, *e.g.*, *id.* §§ 130.2(j), 130.7 (States to identify "water quality limited segments" of water bodies requiring Total Maximum Daily Loads ("TMDLs")); *id.* § 130.3 (a WQS "defines the water quality goals of a water body, or portion thereof"); *id.* §§ 131.10, .12 (State water use designations and anti-degradation obligations apply to each "water body"). The intricate statutory and regulatory scheme requiring States to establish WQSs and TMDLs for *portions* of the navigable waters would be unaffected by a ruling that flow diversions of navigable waters are not subject to NPDES permitting.

Dredged and fill material permits. Contrary to respondents' assertion (Tribe Br. 32 n.15; NWF Br. 13-15), Section 404's permit requirements are not pertinent. Section 404 creates a separate permitting scheme, administered by a separate agency, for discharges of dredged or fill material into navigable waters at specified disposal sites. This case does not involve depositing dredged or fill material into navigable waters or any activity remotely akin to dredging or filling. See U.S. Br. 22 n.7. Nor does it involve any redeposit into navigable waters of dredged spoil.

5. The District's position is fully consistent with CWA Section 401. Section 401(a) of the CWA provides that an applicant for *any* federal license or permit for an activity "which *may* result in *any discharge* into the navigable waters" must obtain a State water quality certification. 33 U.S.C. § 1341(a)(1) (emphasis added); see 40 C.F.R. § 121.1. Amicus National Wildlife Federation points out (at 7) that the term "discharge" in CWA Section 401(a) may encompass

moving navigable waters through power generating turbines licensed by FERC. See *PUD No. 1*, 511 U.S. at 711; *Alabama Rivers Alliance* v. *FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003). That it does so, however, casts no doubt on our argument concerning the scope of Section 402.

On its face Section 401 is more expansive than Section 402. Congress used in Section 401 the term "discharge" rather than "discharge of a pollutant." And Congress defined "[t]he term 'discharge' when used without qualification" to "*includ[e]* a discharge of a pollutant"—clearly indicating that "discharge" covers *more than* the "addition" of pollutants to navigable waters "from" a "point source." Section 502(16) (emphasis added); see *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) ("including" introduces an "illustrative list" without "any suggestion that Congress intended [it] to be complete"); see also *PUD No. 1*, 511 U.S. at 725 ("The term 'discharge' [in Section 401(a)] is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted'") (Thomas, J., dissenting); CWA § 311 (regulating "discharges" of oil and hazardous substances).

Because Congress did not qualify the term "discharge" in Section 401(a) to require an addition from a point source, ruling that the S-9 results in no such addition will leave States' Section 401 certification authority intact. Indeed, when the Corps recently constructed the S-9A pumps to return seepage to the WCA-3 from the C-11 basin (see Pet. Br. 17), it properly sought a Section 401 certification. Of course, even where Section 401 is inapplicable, a State may regulate under State law to achieve its water quality standards. The S-9, built before passage of Section 401, is permitted under Florida law to ensure compliance with State water quality standards. See Pet. Br. 17.

6. Respondents grossly exaggerate the effect of the District's position on the scope of Section 402 regulation. It is not true that activities involving *more* than the transfer of waters containing pollution will escape NPDES regulation on our reading of Section 402. *Cf.* Tribe Br. 25; N.Y. State Br. 19-21. As the United States points out (at 23-24), an activity may cause navigable waters to cease to be such, so that an "addition" may occur if the water is subsequently added back to navigable waters and the other elements of Section 402 are satisfied. That inquiry "depend[s] on the facts of the particular case"—though it is clear that no such change in the character of the water occurs when the S-9 simply pumps it a number of feet through a levee, or as a result of most water diversions. U.S. Br. 24.

For example, removing water to facilitate mineral extraction or pumping it through snowmaking equipment may transform the water into "industrial waste," a defined pollutant. *Cf. Northern Plains Res. Council* v. *Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003); *Dubois*; CWA § 502(6). An impoundment created to capture toxic acid mine drainage "and to contain and evaporate the water through a ponding and recirculation system" is a waste treatment facility, not a navigable water. *Committee to Save the Mokelumne River* v. *East Bay Mun. Util. Dist.*, 13 F.3d 305, 307 (9th Cir. 1993). Impoundments that capture and treat polluted discharges are no more "navigable waters" than are agricultural lagoons created to contain and treat animal wastes. "Conveyances * * * which constitute a component of a mine drainage system" (*Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980)) and overflow from "a closed circulating system to serve the gold extraction process" (*United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979)) similarly do not look like diversions of navigable waters. *Cf.* Browner Br. 13. It takes a vivid imagination—and ignoring EPA's discretion—to get from the narrow proposition that "changes in the movement, flow, or circulation of any navigable waters or ground waters" by

"flow diversion facilities" do not result in a "discharge of pollutants" to the conclusion that decisions like these will be upset. *Ibid.*

7. There exist ample mechanisms to address the diversion of polluted waters. Respondents and their amici contend that not subjecting water diversions to NPDES permitting has adverse consequences for the environment. The parade of horribles they trot out is purely imaginary.

The suggestion that unless NPDES applies to water diversions downstream States will be "powerless" in the face of pollution from upstream neighbors is frankly ridiculous. N.Y. State Br. 16. In fact, with regard to the *NPDES program*, downstream States stand in "a subordinate position to source States" with only "an advisory role." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490-491 (1987). In contrast, EPA regulations require that in establishing water quality standards for a water body, "the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b). A State must therefore respect the water quality standards of downstream and adjacent jurisdictions. In addition to CWA actions to enforce this requirement by EPA *or* affected States *or* citizens, those who dump pollution on downstream neighbors are also potentially subject to nuisance and other state law suits. See *Ouellette*, 479 U.S. at 498 (an affected downstream State may sue for violation of the upstream State's laws, including its "nuisance law"). Furthermore, if a State fails to establish and implement TMDLs, EPA may deny that State CWA grant money. *Pronsolino*, 291 F.3d at 1140. See also Ryan, CLEAN WATER ACT HANDBOOK 209-210.

The CWA contains numerous other mechanisms to deal with externalities. For example, EPA is charged to encourage "cooperative activities by the States," including "compacts" to further "prevention and control of pollution," and many

States are party to such compacts. 33 U.S.C. § 1253. EPA mediates "differing water quality standards that may be set by States and Indian tribes located on common bodies of water." *Id.* § 1377(e). And the Act provides that certain water quality problems spanning more than one State are to be managed by "a single representative organization." *Id.* § 1288(a)(3). Multistate approaches to protecting shared water resources are the norm. See, *e.g.*, Harry Hughes & Thomas Burke, *The Cleanup of the Chesapeake Bay*, 11 NAT. RES. & ENV'T 30 (Fall 1996) (describing the Maryland, Virginia, Pennsylvania, District of Columbia, and EPA Chesapeake Bay Agreement); 33 U.S.C. § 1270 (establishing the multi-State and multi-agency Lake Champlain Management Conference); http://www.epa.gov/glnpo/gls/gls01.html (multi-State and -agency Great Lakes Strategy).

To address *intra*state pollution a State need only establish and implement appropriate water quality standards and TMDLs. The notion, repeated in a number of the opposing briefs, that a State would be powerless to stop the pumping of saltwater into a freshwater river if diversions of navigable waters lie outside Section 402 is absurd. The introduction of saltwater would violate State water quality standards and TMDLs and the State could prohibit that activity under State law. If the activity required a federal permit of any kind—for example a Section 404 permit for construction of the pump—the State could deny Section 401 certification. If a State permits saltwater to be diverted into freshwater or heavily polluted water to be diverted into pristine water it has only itself to blame; it has all the regulatory tools necessary to prevent this from occurring. Just as a State may impose onerous land use restrictions and best management practices on forestry operations within a polluted watershed to achieve its TMDLs (see *Pronsolino*, 291 F.3d at 1129-30), so it may choose to subject water diversions to rigorous nonpoint source regulation to prevent pollution reaching any segment of its navigable waters (including effluent or other discharge limitations, see Pet. Br. 36 n.7). In light of the panoply of

State powers over nonpoint source pollution reserved to the States under the CWA and existing under State law, it is extraordinary that New York State would complain to this Court (at 20-21) that only through NPDES can it address New York City's diversion of reservoir water into a trout stream to supply the City with drinking water. New York State clearly does not need to rely on Section 402 to deal with that issue. See N.Y. Envtl. Conserv. Law § 17-0501.[2]

8. Requiring NPDES for water diversions is wholly unnecessary and enormously disruptive. While the perils respondents purport to see are insubstantial, the adverse consequences of requiring facilities like the S-9 to obtain NPDES permits are not. The United States has explained (at 28) that Congress designed the NPDES program to address "distinctly different issues" from those raised by public transfers of waters polluted by a multitude of upstream sources, and that applying NPDES where it does not belong would "misdirect governmental resources" to "unnecessary

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[2] Minnesota cities that discharge pollutants from a POTW to the Mississippi river are concerned about a State administrative rule that imposes more stringent phosphorus discharge limits where the discharge "affects a lake or reservoir," a State law issue that has nothing to do with the proper scope of Section 402. Pennsylvania apparently applies its NPDES permitting program to interbasin water diversions—based on a one paragraph ruling of the Commonwealth Court of Pennsylvania, devoid of analysis, that interbasin transfers result in an "addition." *Del-Aware Unlimited, Inc.* v. *Pennsylvania*, 508 A.2d 348, 359 (1986). Of course, Pennsylvania could follow its "Policy for Permitting Surface Water Diversion" regardless whether CWA Section 402 requires it. In fact, as Pennsylvania admits (at 15), that policy strays well beyond the NPDES program by addressing adverse impacts of water diversions with "Best Management Practices" other than "technology-based effluent limitations"—a core State law strategy for addressing nonpoint source pollution but not something generally associated with the federal NPDES program. See Ryan, CLEAN WATER ACT HANDBOOK 16-32.

and duplicative" ends and "hinder" the Everglades restoration project to which the Nation has committed $8 billion. A host of state and local water management agencies and their national organizations, numerous States, and state and municipal government organizations such as the National League of Cities, U.S. Conference of Mayors, and Council of State Governments have explained that imposition on NPDES permitting on hundreds of thousands of such transfers would be impractical, wasteful, hugely disruptive of the Nation's intricate system of water allocation and control, and entirely otiose in light of nonpoint source programs and powers that address pollution in diverted waters.

Respondents denigrate our federalism concerns. But extending NPDES to the traditionally local water management activity of moving water across levees fundamentally shifts the federal/state balance achieved in the CWA through "distinct roles for the Federal and State Governments." *PUD No. 1*, 511 U.S. at 704. It is little comfort that many States "administer" NPDES permits. NPDES permits are federally mandated where they apply; the error of the Court below was to impose this federal mandate where it does not belong. And States administering NPDES permits must "compl[y] with detailed [federal] statutory and regulatory requirements." *United States* v. *Ohio*, 503 U.S. 607, 633 (1992) (White, J., dissenting in part); see *id.* at 634 ("Even when a State obtains approval to administer its permitting system, the Federal Government maintains an extraordinary level of involvement"); *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (distinguishing state and federal roles under the CWA); Ryan, CLEAN WATER ACT HANDBOOK 202 ("The control of nonpoint source pollution is a study in classic federalism").

Congress carefully drew distinctions to preserve and protect the primacy of States' rights and responsibilities to "plan the development and use * * * of land and water resources" and so as not to impair allocations by States of their waters. 33 U.S.C. § 1251(b), (g); see U.S. Br. 3, 25 & n.11. The significant burdens that come with federalizing

traditionally local water management are not to be taken lightly, but should be imposed only on the basis of a clear statement from Congress—which is nowhere to be found. See *SWANCC*, 531 U.S. at 175; CWA § 304(f)(2)(F).[3]

Respondents dismiss the reality that NPDES is an onerous, time- and resource-consuming program designed for different types of facilities than water diversions. See J.A. 146; U.S. EPA, *NPDES Permit Writers' Manual*. Permits are designed for scientific analysis of effluent impacts and the study of end-of-pipe technologies to reduce them—aimed at reaching the lowest level of discharge technologically feasible. See 33 U.S.C. § 1311(b)(1)(A)-(C). It is far-fetched to suppose that the District can control through technology applied at the S-9 the unpredictable presence and levels of pollutants introduced by countless others throughout hundreds of square miles of waters in the C-11 basin. See National League of Cities Br. 20-22. Nor would it be beneficial to try, given that the pollution is *better* addressed at its source through watershed planning and the panoply of state nonpoint source powers, which aim to reduce pollution *before* it reaches the C-11 canal. See U.S. Br. 27.

Respondents also ignore the impact that adding huge numbers of water management facilities nationwide to the

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[3] Unlike the *individual user's* water rights at issue in *PUD No. 1*, the S-9 is part of the *State's* system to store and distribute water for multiple public purposes. Pet. Br. 11-12. Congress made clear, this Court has observed, that its goal in Section 101(g) was not to "prohibit * * * incidental effects" on "individual water rights" but to "insure that State allocation systems are not subverted" by overly aggressive interpretations of the Act. *PUD No. 1*, 511 U.S. at 721, quoting 1977 LEG. HIST. at 532. Section 101(g) is a "specific indication" that Congress did not want to "interfere any more than necessary with state water management" (*Gorsuch*, 693 F.2d at 178) and thus militates strongly against stretching Section 402 to reach diversions like S-9 that are an integral component of the State's water management system.

NPDES will have upon a backlogged and over-budget program that must reissue every NPDES permit every five years. See EPA Office of Inspector General, *EPA Should Take Further Steps to Address Funding Shortfalls and Time Slippages in Permit Compliance System Modernization Effort*, No. 2003-M-00014 (May 20, 2003). It is no exaggeration to suggest that the system would collapse under the additional burdens respondents seek to impose.

What NPDES would most unfortunately accomplish is to take restoration of the Everglades, a world treasure, out of the consensus-building management process that has been developed over decades of State and federal effort—a process that every responsible agency, not to mention Congress, has endorsed as the best hope of restoring the Everglades.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2003